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No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED.

1. Whether there is jurisdiction under the Foreign Sovereign Immunities Act where decedents were killed in the United States, giving rise to a wrongful death case against a business corporation, majority-owned by a foreign state, where:

(a) defendant assumed a duty in the United States to transport the decedents non-negligently,

(b) defendant arranged decedents' round-trip transportation through defendant's office in the United States,

(c) defendant agreed to transport the decedents as the carrier from the United States to Mexico and back,

(d) defendant began the trip by transporting the decedents as the carrier from the United States,

(e) defendant delegated the return flight from defendant's company town to a substitute for the company airplane, the substitute acting as a contract carrier,

(f) the pilot, engaged by the defendant on a scheduled flight on the corporate transportation link, transported decedents in the United States on behalf of the corporation, and

(g) negligent piloting in United States airspace caused the airplane to crash in the United States killing all on board, as part of the return trip to the United States?

2. Is there jurisdiction under the Foreign Sovereign Immunities Act, implied waiver exception, where the defendant waives sovereign immunity in opening statement and stipulates to jurisdiction at trial?

Parties to the Proceeding

Petitioner is Exportadora De Sal, S.A. De C.V. ("Exportadora"), a Mexican corporation, majority owned by the United Mexican States, a foreign state.

Respondents are Hiroko Sugimoto, Kimiko Kodani, Mayumi Nukiwa, and Kuniko Omachi, individually and as Guardian Ad Litem on behalf of Eri Omachi, a minor.

Mitsukuni Sugimoto, Yasunobu Sugimoto, and Kyoko Kodani are no longer parties to the case.

Exportadora's statement does not accurately state the parties to the case.

Rule 29.1 Listing

Exportadora is forty nine percent owned by Mitsubishi Corporation ("Mitsubishi"), the parent company of the Mitsubishi group, which issues shares to the public traded on the Tokyo, London and Paris stock exchanges.

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Other Authorities:

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2 Witkin, Summary of California Law,
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OPINIONS AND DECISIONS BELOW

The opinion of the court of appeals that petitioner seeks to have reviewed is Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309 (9th Cir. 1994). (A 110) [1] The findings and conclusions of Senior District Judge James M.

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[1] The appendix is cited by page and finding number. Respondents' Appendix begins at page 106, after Exportadora's 105 pages.

Fitzgerald at trial were a memorandum decision of March 9, 1993. (A 12-76) An order amending judgment was filed May 7, 1993. (A 117) [2] Final judgment was entered in district court on May 11, 1993. (A 147) [3]

Memorandum decisions were entered denying Exportadora's motion to dismiss for sovereign immunity on June 29, 1989 (A 121)[4], and determining that California law is applicable on August 31, 1989. (A 131)[5] Exportadora's interlocutory appeal on sovereign immunity and choice of law is Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991). (A 88)

JURISDICTION

Exportadora seeks certiorari. 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, excerpted in the Appendix. (A 106)

STATEMENT OF THE CASE

A. FACTS.

The petition speaks as if the decedents had nothing

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[2] Required by Rule 14.1(k)(i) and omitted by Exportadora from the Appendix.

[3] Required by Rule 14.1(k)(iv) and omitted by Exportadora from the Appendix.

[4] Required by Rule 14.1(k)(ii) and omitted by Exportadora from the Appendix.

[5] Required by Rule 14.1(k)(ii) and omitted by Exportadora from the Appendix.

to do with the United States and nothing to do with Exportadora. To the contrary, *decedents were Exportadora's passengers and business visitors, killed in San Diego, California* on September 30, 1987 by Exportadora's negligent commercial activity.

The case is based on transactions and events that occurred in the United States. Exportadora is a salt manufacturer with an office in San Diego, California. *The travel arrangements for decedents were made through Exportadora's San Diego office.* Schoenberg at 781. (A 97) The round trip began and ended in San Diego. *The negligence occurred here. The non-delegable duty was assumed by the defendant in the United States.* The decedents were accepted as defendant's passengers for carriage through defendant's San Diego office. *The decedents were killed in the United States* while Exportadora was transporting them, through its agent under a non-delegable duty, *on a trip to the United States.*

Exportadora agreed to transport the passengers, as the carrier for a round trip, between San Diego and Guerrero Negro. (A 47-48 F 97-98; A 51 F 103; A 62 F 122; A 65 F 126; A 48 F 100; A 236.) Exportadora's assertion that it only "agreed to arrange for transportation to Guerrero Negro and back" is contrary to the findings. Exportadora transported the passengers round trip from San Diego. (A 46 F 97-A 47 F 98; A 52 F 104-105)

The district court found that the *transportation of the passengers from Guerrero Negro to Tijuana was on behalf of Exportadora.* (A 31, F 49)

The Ninth Circuit in Sugimoto affirmed the district court's factual finding that Exportadora was engaged in commercial activity in the United States when the air taxi flew in United States air space. *The charter flight was acting for Exportadora in transporting the passengers.* (A 31 F 49; A 232-233, 239)

In Sugimoto, the Ninth Circuit correctly affirmed that "Exportadora controlled the transportation offered to

business visitors to its [Guerrero Negro] plant and company town . . . arranged for their transportation, paid all the expenses, fed them, determined where they would stay and how they would come and how they would go." (A 8)

The passengers were scheduled to travel round trip on the company airplane. (A 52 F 104; A 228) Exportadora chartered the air taxi as a substitute for the company airplane. (A 52 F 104; A 227) The carrier-passenger relationship between Exportadora and the decedents continued to the time of the accident. (A 48 F 98; A 55 F 110; A 24 F 33)

There were no tickets for the flight. (A 213 ¶ 32)

Exportadora's assertion that all decisions regarding the travel arrangements were made in Mexico and Japan is contrary to the record. There is no evidence of any decision in Japan. The district court found that Exportadora made all the arrangements (A 22 F 22), and that the passengers had nothing to do with any arrangements for their travel and accommodations. (A 22 F 22; A 55 F 110)

The agreement to transport the passengers was made through the San Diego office. (A 15 F 6; A 211 ¶ 18; A 231; A 225, 227-228, 230-231) Exportadora's San Diego office put the passengers on the list to travel. (A 231) *Exportadora's employees or representatives in San Diego accepted the decedents in the United States as Exportadora's passengers, when their trip to Mexico began.* (A 19 F 14; A 20 F 16)

Exportadora is one of the world's largest commercial salt producers, 51% owned by the United Mexican States ("Mexico") and 49% by Mitsubishi Corporation ("Mitsubishi"). (A 208) Exportadora's remote company town is located on the desert at Guerrero Negro, Mexico. Exportadora's San Diego office communicated with parties outside Mexico on behalf of the Exportadora salt plant in Guerrero Negro. Sugimoto at 1310. (A 5, 14, 92, 123, 188)

"The district court found that *Exportadora maintained a regular air-and-auto link between its San Diego*

and Guerrero Negro offices as part of its commercial operations, that it arranged, through its San Diego office, round-trip transportation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego." Schoenberg at 781. (A 97-98; A 15 F 6; A 47 F 97; A 123-124)

Two Americans were killed in the accident, on September 30, 1987. (A 158; A 93; Schoenberg at 779) [6] The other three passengers were Japanese, and their widows and orphan are respondents. Mr. Omachi was a purchasing agent for Asahi Chemical Industry Co., Ltd. ("Asahi") a substantial customer for Exportadora's salt. (A 210-211) Dr. Sugimoto and Dr. Kodani were professors at Tottori University. The university was conducting an agricultural project, growing vegetables in the desert, at Guerrero Negro. (Schoenberg at 779; A 93; Sugimoto at 1310; A 6, A 16 F 8, A 18 F 12, A 209 ¶ 12 - 210, 243)

Exportadora received consideration in exchange for its transportation of each passenger. (A 22 F 24) *Exportadora benefited commercially from transporting each passenger.* (A 22 F 24; A 61 F 120) The district court found that "Exportadora enjoyed the primary benefit of the transportation of the decedents." (A 61 F 120) Exportadora's statement that it did not profit, or receive anything of value, for the transportation is false.

The district court did not hold that Exportadora had no control of the flight after it left Guerrero Negro, as Exportadora misstates. The district court found that the pilot controlled only the decision of whether to undertake the flight, how the flight would be conducted, and whether under the restricted conditions a landing at Tijuana airport should be attempted. (A 60 F 119)

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[6] The two decisions at the outset of the case (A 121-130, 131-146), affirmed by the Ninth Circuit in Schoenberg, contain the findings required by the FSIA to determine lack of immunity at the outset of the case.

The district court found that Exportadora scheduled the flight (A 60 F 119; A 30 F 49), arranged the flight to transport decedents as Exportadora's passengers (A 65 F 126), scheduled the departure to accommodate a customer (A 30 F 49; A 31 F 51), scheduled the arrival at Tijuana by 8:00 a.m. (A 30 F 47), and told the pilot to pick up two Exportadora employees in Tijuana to return to Guerrero Negro. (A 24 F 33; A 208 ¶ 2) In other words, Exportadora controlled the flight schedule, the list of passengers, the destination, the time of departure, and the time of arrival.

Exportadora's assertion that the pilot was neither expected nor authorized to attempt a landing at Tijuana through United States air space is contrary to the findings, contrary to all of the evidence, and false.

Exportadora intended the flight to use United States air space for an instrument landing. An instrument flight rules ("IFR") flight plan was filed before departure. (A 32 F 53) Obviously, IFR visibility conditions, and use of the instrument landing system ("ILS"), were foreseeable to the pilot and to Exportadora, where an IFR flight plan was filed. It is stipulated that Tijuana Airport uses United States airspace for the ILS. (A 213 ¶ 40)

Exportadora told the pilot to go to Tijuana (A 208 ¶ 2, 212 ¶ 30, 213 ¶ 35, 237). Any instrument flight using the Tijuana ILS would certainly be in the United States. *Rather than being unexpected and unauthorized, the use of United States air space was virtually certain*, entirely foreseeable under the IFR weather forecast, and an implied part of Exportadora's instructions to go to Tijuana.

The ILS approach to Tijuana Airport does not "briefly traverse" or "swing over" the United States as Exportadora misstates. The ILS extends for miles in a straight line into the United States. (A 155) *The pilot flew 9 or 10 miles in United States air space prior to the crash.* (A 272-273) Every use of the ILS is certain to involve substantial contact with the United States.

Exportadora's denial of the weather forecast is false.

The forecast for San Diego, where the ILS is located, was for ceilings of 200 feet, visibility of one half mile in fog until 11:00 a.m., a forecast of below minimum visibility for an instrument landing. (A 154, 246-247) The forecast for Tijuana was for temporary ceilings of 1,000 feet and visibility of 2 miles in fog until 8:00 a.m., an instrument flight rules ("IFR") forecast. (A 150, 249-250) The accident occurred in San Diego at 7:56 a.m. (A 41 F 81) in forecasted San Diego weather conditions of less than minimum visibility. *The flight, following a schedule under Exportadora's control, arrived in less than minimum weather conditions for a landing attempt. These conditions were foreseeable before departure.* [7]

The district court found in 1989 that "[i]t was entirely foreseeable to Exportadora that passengers could be injured in the United States on a trip to the United States." (A 145 n. 2; Emphasis in the text.)

Exportadora's petition is false in asserting that Exportadora "specifically requested the pilot to fly on to another airport . . . if he encountered poor weather in Tijuana." (Petition at 18) Exportadora actually told the pilot "if conditions were not good there in Tijuana, that *he [the pilot] could go to Mexicali.*" (A 30 F 47; A 237) No instruction was given. *The pilot could go as an option.*

The air controller did not instruct the pilot, nor encourage the pilot, to make an attempt to land, as Exportadora misstates.[8] The pilot, knowing airport operations were restricted with fog, decided to make an ILS landing attempt. (A 28-29, 40 F 78, 41 F 79, 213 ¶ 38)

The accident was caused by the pilot's negligence in

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[7] Plaintiffs' expert meteorologist (A 249-250) and expert pilots (A 265-266, 274-278) testified that IFR conditions and fog were foreseeable.

[8] Exportadora's misstatements and false statements are so numerous that it would be impossible to correct all of them within the page limits. The Court should not believe any statement from Exportadora.

United States air space in failing to follow the ILS glide path and failing to execute a missed approach at decision height. (A 43 F 86; 45 F 93; 263, 266, 268, 269, 272, 273) The pilot was incompetent to conduct an IFR approach, as the experts testified. (A 265, 274, 278-280) *The airplane collided with a hill in the United States* at a high rate of speed with power applied to both propellers. (A 43-44; 173, 252, 258, 259) At the time, visibility was less than the minimum required for an instrument landing. (A 214 ¶ 45)

Exportadora did not contract with a commuter airline, licensed to provide airline services, for the flight, as the petition misstates. (Petition at 5 ¶ 1) Aviones[9] is an air taxi operator (A 6 ¶ 3; A 25 F 34) not a commuter airline. Exportadora's statements to the contrary are false and vexatious.[10]

Exportadora transported Dr. Sugimoto and Dr. Kodani at the request of Mitsubishi, an Exportadora shareholder. (A 61 F 120) Exportadora gained valuable consideration for transporting the scientists, including stockholder goodwill (A 66 F 128) and future commercial dealings in other contexts. (A 22 F 24)

The government of Mexico encouraged Exportadora "to assist the Japanese [with the agricultural project] as a courtesy to its co-stockholder in Exportadora and Tottori University." (A 176, 233, 243; A 127, 96-97, 7) *Exportadora accepted the request to maintain goodwill with its shareholder, which is not an inherently public act*, as the Ninth Circuit held in Schoenberg. (A 96-97, 236)

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[9] Exportadora's assertion about Aviones' reputation is not in the record. Reputation evidence was excluded. (RT XV 14:6-12; RT XVI 26:4-27:7)

[10] Exportadora argues evidence of Aviones' insurance, admitted for a limited purpose, for an unlimited purpose on liability. (Petition at 25 n.3) Respondents object and move to strike references to insurance of $ 13,329 per passenger (A 86 F 185), under Rule 411, Fed.R.Evid.

Mr. Bremer, Exportadora's President, testified at trial that *the government of Mexico did not order Exportadora to assist the agricultural project* (A 234), "there were no orders given". (A 235) Assisting the agricultural project provided Exportadora with stockholder goodwill from Mitsubishi. (A 236)

Exportadora transported the scientists to appease its majority stockholder, an activity that a private entity can perform. (A 96, 243-244) As the Ninth Circuit affirmed in Schoenberg "the Mexican government did not order Exportadora to assist it in carrying out a sovereign function". (A 96-97) The evidence at trial agreed with that finding. (A 233-235)

The agricultural project was not conducted with the cooperation of the governments of Mexico and Japan, as Exportadora misstates. (Petition at 4 ¶ 1) There is nothing in the record about the government of Japan in 1987, the year of the accident. Mr. Bremer testified that in 1988, *after the accident*, an agreement was signed between those governments for research. (A 233-235) *During 1987, at the time of the accident, the agricultural project was being conducted by Tottori University, at the invitation of Mitsubishi* (A 176, 184-185, 233-234, 235), on Exportadora's land (A 176 ¶ 4) not the government's land.

Dr. Sugimoto and Dr. Kodani were not transported at the direction of the government of Mexico pursuant to an agreement between the governments of Mexico and Japan, as Exportadora misstates. (Petition at 4 ¶ 2) There is nothing in the record about the government of Japan in 1987. The district court found in 1989 that the Mexican government requested that Exportadora transport the professors. (A 124, 127)

The wreckage of the airplane was stolen from the site of the accident in the United States. (A 33-34, 257-258)

B. PROCEEDINGS BELOW AND JURISDICTION IN THE DISTRICT COURT.

The Ninth Circuit entered judgment March 25, 1994, denied Exportadora's petition for rehearing and suggestion for rehearing en banc on August 2, 1994, and denied Exportadora's motion for stay of mandate on August 12, 1994. The mandate issued on August 15, 1994.

Exportadora's application to the Supreme Court for a stay of enforcement of judgment, No. A 94-131, was denied by Justice O'Conner on August 23, 1994.

Jurisdiction in the district court was held to rest on 28 U.S.C. §§ 1330, 1605(a)2[1], the first clause of the commercial activities exception of the Foreign Sovereign Immunities Act ("FSIA") in four decisions. Exportadora is a business corporation, majority-owned by a foreign state.

Exportadora's motion to dismiss for sovereign immunity was denied on June 29, 1989. (A 121-130) The district court made factual findings, as required under Rule 12(b)(1), Fed.R.Civ.P., to resolve the question of sovereign immunity at the outset of the case. Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994). The district court must resolve factual disputes on a Rule 12(b)(1) FSIA motion. Land v. Dollar, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n. 4, 91 L.Ed. 1209 (1947); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988). Exportadora's assertion is false that the sovereign immunity issue was not resolved at the beginning of the case. The cases were consolidated after that decision (A 192), and that decision is part of the record in these cases.

Jurisdiction in the district court also rests on three other exceptions that the district court and Court of Appeals did not have to reach, the second and third clauses of the commercial activities exception and the implied waiver exception. All three clauses of the commercial activities exception were alleged in the complaint (A 197-200). The pretrial order invokes the first and third clauses. (A 207-208), both of which were argued at trial and in both appeals. Exportadora's statements to the contrary are false.

All three clauses, and the implied waiver exception, were argued to the Ninth Circuit in Sugimoto.

The district court determined on August 31, 1989, that California law applies under choice of law principals (A 142-146), and that the accident in California was foreseeable to Exportadora. (A 144-145)

On interlocutory appeal the Ninth Circuit affirmed. Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991). Exportadora settled with the Schoenberg and Hernandez families and stipulated dismissals were entered in those cases on May 15, 1992. [11]

Trial began January 11, 1993.

Exportadora's assertion that it was "denied the opportunity of contesting jurisdiction at trial" is false. Exportadora waived sovereign immunity in opening statement, then stipulated to in personam jurisdiction and subject matter jurisdiction for the stated purpose of saving time. (A 220) After the waiver and stipulation, the district court found at trial that there was jurisdiction. (A 220)

Plaintiffs presented evidence on jurisdiction. Exportadora presented no evidence of lack of jurisdiction and never argued sovereign immunity at trial.

The Ninth Circuit requested a letter brief on whether there is jurisdiction after Saudi Arabia v. Nelson, 507 U.S. - - , 123 L.Ed.2d 47, 113 S.Ct. 1471 (1993). Respondents filed a motion in the Ninth Circuit to amend the jurisdictional allegations of the complaint under 28 U.S.C. § 1653 to allege implied waiver.

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[11] A new consolidation order was entered June 5, 1992, providing that the record in the consolidated cases under the previous low number case, Schoenberg, is part of the record in the present cases, and consolidating the present cases. The record in the cases consolidated under case no. 88-1532, Sugimoto, consists of more than 500 docket entries, and under Schoenberg, 580 docket entries. The cases have the longest docket in the history of the Southern District of California. The record in Schoenberg includes the original sovereign immunity decisions.

The Ninth Circuit held that subject matter jurisdiction exists because the case is based on Exportadora's commercial activity in the United States. Exportadora's transportation of the passengers on the fatal flight was found to be Exportadora's commercial activity in the United States which included negligent piloting, an element of plaintiffs' claim. Sugimoto, at 1311.

On July 1, 1994 the Ninth Circuit amended its opinion. (A 10) Exportadora misstates that the Ninth Circuit did not rule on the merits of any liability theory. The Ninth Circuit affirmed by implication that Exportadora had a non-delegable duty to transport the passengers non-negligently, citing the case of Van Arsdale v. Hollinger, 68 Cal.2d 245, 253, 66 Cal.Rptr. 20, 25, 437 P.2d 508, 513 (1968), Sugimoto at 1312, a case relied on by the district court in concluding a non-delegable duty applies. (A 60-61)

The Ninth Circuit did not have to reach the other liability theories of non-delegable contractual duty and ostensible agency relied on by the district court.

Personal jurisdiction exists by stipulation. [12] Service of process was accepted by stipulation. Personal jurisdiction was stipulated to at trial. (A 219-220, 222) Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099, 2104-2105 (1982).

SUMMARY OF ARGUMENT

The case is based on acts and events that occurred in the United States. The opinion correctly applies Saudi Arabia v. Nelson, 503 U.S. - - , 123 L.Ed.2d 47, 59, 113

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[12] The parties in Republic of Argentina v. Weltover, 504 U.S. - - , 119 L.Ed.2d 394, 402, 408, 112 S.Ct. 2160 (1992) were all citizens of foreign states. Jurisdiction under the FSIA arises under federal law. The FSIA authorizes a foreign plaintiff to sue a foreign state in a federal court on a non-federal claim. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492-493, 76 L.Ed.2d 81, 89, 91-92, 103 S.Ct. 1962 (1983).

S.Ct. 1471, 1477 (1993). Defendant assumed a non-delegable duty in the United States. Decedents were killed in the United States. All of the elements of negligence occurred in the United States. Defendant made decedents' travel arrangements through defendant's office in the United States. The round trip began and ended in the United States. The accident in the United States was foreseeable on a trip to the United States. The pilot was authorized by defendant to carry defendant's passengers and to attempt a landing through United States air space.

In arguing that jurisdiction should not be defined by the elements of the state law claim (Petition at 21), Exportadora is arguing in effect that the holding in Saudi Arabia was incorrect. To the contrary, defining jurisdiction by the elements of the claim is a clear, uniform rule. Saudi Arabia was correct and should not be reconsidered.

The circuits agree that a principal's commercial activity, carried on through an agent in the United States, is the principal's commercial activity as to jurisdiction over the principal. The issue in this case is not the same as an issue of separate corporate existence. There is no conflict between the circuits.

One decedent was the purchasing manager of a major customer of Exportadora. The two decedent scientists were transported at the request of an Exportadora shareholder. Exportadora received consideration and commercial benefit from transporting each passenger.

Exportadora argues that its activity was not commercial because the "for profit" test should define commercial activity (Petition at 22 n.2), and it denies making a profit on the transaction. Exportadora is arguing in effect that the Court's holding in Republic of Argentina v. Weltover, 504 U.S. - -, 119 L.Ed.2d 394, 405, 112 S.Ct. 2160 (1992) was incorrect. Weltover rejected the "for profit" test in favor of the test of whether the activity is the type of action by which a private party engages in trade, traffic or commerce.

Transporting passengers, arranging transportation, and extending a courtesy to a shareholder, are the type of actions by which a private party engages in commerce. Exportadora's activity was commercial. Weltover was correct and should not be reconsidered.

Exportadora waived sovereign immunity at trial, and its statements to the contrary are false.

Exportadora's petition argues in effect against the Court's holdings in recent controlling cases. The petition misstates the facts and law, misstates the findings and holdings of the Ninth Circuit and district court in the cases below. The opinion of the Ninth Circuit correctly applies the Court's controlling cases. Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT WITH SUPREME COURT DECISIONS.

A. Exportadora's Contentions.

Exportadora contends that the case conflicts with Saudi Arabia because plaintiffs' claims are not based on commercial activity of Exportadora which had substantial contact with the United States, the flight was not commercial activity of Exportadora, and the crash in the United States was unexpected and unauthorized.

Exportadora contends its activity was not commercial because it did not profit from the transaction.

Exportadora contends that there is conflict with another circuit, where the activities of a corporate subsidiary were not attributed to the parent company based only on ownership, contending that attributing the pilot's negligence under a non-delegable duty is the same as attributing a subsidiary's activities to a parent company only because of ownership.

Exportadora contends that defining jurisdiction by

the elements of the state law claim is at odds with a uniform body of law. Exportadora contends lack of sovereign immunity was not determined at the outset, denying it due process.

Exportadora's contentions are contrary to the record, misdescribe the legal issues, and are contrary to Saudi Arabia which determines jurisdiction under the commercial activities exception of the FSIA based on the elements of the state law claim, a clear uniform rule. Exportadora's contentions are also contrary to the holding in Weltover which rejects the profit motive test of commercial activity.

B. Saudi Arabia is Correctly Applied.

1. The Case is Based on Commercial Activity Carried on by Exportadora Having Substantial Contact with the United States.

The decision correctly applies Saudi Arabia v. Nelson, 503 U.S. - - , 123 L.Ed.2d 47, 59, 113 S.Ct. 1471, 1477 (1993) to the facts. Saudi Arabia applied the first clause of the commercial activities exception, applicable where the case is "based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1605(a)(2)[1]. Such activity is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). This definition includes commercial transactions, such as a business flight, performed in whole or in part in the United States. Weltover, 119 L.Ed.2d 394 at 408; H.R.Rep. No. 1487, 94th Cong., 2nd Sess. 16, *reprinted in* 1976 U.S. Cong. & Admin. News 6604, 6615.

In Saudi Arabia the Supreme Court identified the conduct on which an action is "based" as meaning the "elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case . . . ." Saudi Arabia, 123 L.Ed.2d 47, 59 (1993). If one element of a claim is

based upon the defendant's commercial activity in the United States there is jurisdiction. Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991).

Exportadora assumed the element of a duty of care when it accepted decedents as Exportadora's passengers in San Diego, California at the outset of the round trip. Brown v. Feather River Lumber Co., 203 Cal. 493, 497-498 (1928). (A 19 F 14, A 20 F 16, A 46 F 97, A 52 F 104, A 65 F 126) Decedents were killed in the United States (A 14 F 4), when the duty was breached in the United States by the pilot's negligence. (A 7; 45 F 93) Sugimoto at 1311.

Defendant made the travel arrangements through the defendant's office in the United States. Schoenberg at 781. (A 97; A 22 F 22; A 211 ¶ 18; A 231, 225, 227-228, 230-231) Defendant agreed to transport the decedents as the carrier from San Diego to Guerrero Negro and back to the United States. (A 47 F 98; A 52 F 104) The trip began in the United States with defendant transporting decedents, and assuming the duty here. (A 19 F 14, A 20 F 16)

The airplane crashed in the United States on the return trip to the United States. Schoenberg at 781-782; Sugimoto at 1310-1312. The pilot was transporting the passengers in the United States on behalf of Exportadora (A 31 F 49, A 47 F 98, A 51 F 103 - A 52 F 104), on a flight on the company's transportation link. (A 15 F 6) (A

The transportation agreement provided that if decedents traveled to San Diego, Exportadora would transport them to Guerrero Negro and back. The last act done to give the agreement binding effect was Exportadora's acceptance of decedents as passengers in San Diego. The contract was made in California "where the last act is done which is necessary to give a contract binding effect." 1 Witkin, Summary of California Law, 9th Ed. 1987, Contracts, § 47, p. 86; Michelin Tire Co. v. Coleman Co., 179 Cal. 598, 604 (1919).

Undertaking a duty in the United States to transport passengers safely, transporting passengers negligently in

United States air space, crashing into the United States, and causing wrongful death in commercial activity in the United States, is carrying on commercial activities having substantial contact with the United States. Sugimoto at 1311; 28 U.S.C § 1603(e). People were killed by Exportadora's negligent commercial activity in the United States.

Making travel arrangements, or an agreement for transportation, from and to the United States, through an office in the United States is substantial contact with the United States for jurisdiction. Santos at 894.

2. The Pilot was Exportadora's Agent Under a Non-delegable duty.

Undertaking a non-delegable duty was a commercial act by Exportadora in the United States, as were the elements of negligent breach, and death caused by the breach. These elements are sufficient to satisfy 28 U.S.C. § 1605(a)(2)[1] under the holding in Saudi Arabia. The non-delegable duty was assumed in the United States when Exportadora accepted the passengers in San Diego and began to transport them. *All the elements of negligence by the pilot, Exportadora's agent under the non-delegable duty, occurred in the United States.*

Under California law, an independent contractor is the agent of the principal when the principal has a non-delegable duty. The principal is ". . . *liable for the negligence of his agent, whether his agent was an employee or an independent contractor.*" Maloney v. Rath, 69 Cal.2d 442, 446 (1968). [Emphasis added.]

A company may be both an agent and an independent contractor under California law. City of Los Angeles v. Meyers Bros. Parking System, Inc., 54 Cal.App.3d 135, 138, 126 Cal.Rptr. 545 (1975); Mottola v. R.L. Kautz Co., 199 Cal.App.3d 98, 108, 244 Cal.Rptr. 737 (1988). There is no inconsistency in the charter company

having both capacities under a non-delegable duty. [13]

Non-delegable duty was alleged in the complaint (A 198 ¶ 13) and was specified in the pretrial order. (CT 209, 1-7-93, p. 22:4-11) Exportadora's statement that only negligence was alleged is false.

The trial court found a non-delegable tort duty based on public policy grounds. (A 56-57, 60-62) Van Arsdale v. Hollinger, 68 Cal.2d 245, 253 (1968); Alaska Airlines v. Sweat, 568 F.2d 916 (Alaska 1977).

The Ninth Circuit affirmed by implication the conclusion that Exportadora had a non-delegable tort duty on public policy grounds, citing one of the cases relied on by the district court, Van Arsdale. Sugimoto at 1312. (A 11; A 60-61; A 55-56; A 116)

Even if, for the sake of argument, Exportadora's contention were accepted that the Ninth Circuit affirmed an exception to the general rule of nonliability for the torts of an independent contractor, some of the reasons relied upon - in addition to the pilot's negligence - occurred through defendant's office in the United States, including Exportadora's control of transportation offered to business visitors, approval of business visitors, arranging for transportation, and determining how business visitors would come, and how they would go. (A 116) These reasons are Exportadora's commercial activities having substantial contact with the United States.

3. The Accident was Foreseeable in the United States. The Pilot was Authorized to be in the United States.

Exportadora's commercial activity had substantial contact with the United States, consistent with Saudi

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[13] There is also no inconsistency in Aviones being an ostensible agent and an independent contractor. (A 65 F 126)

Arabia, because the accident in the United States was foreseeable to Exportadora on a trip to the United States (A 129; A 145 n.2; A 213 ¶), not fortuitous as Exportadora misstates. The flight was intended, expected and authorized by Exportadora to enter the United States, as would any flight under the forecast for fog. Exportadora in fact instructed the pilot to land at Tijuana, and never instructed him to go to another airport. (A 237; A 30 F 47) Exportadora's statements to the contrary are false.

In a nearly identical case, where Americans were killed in the United States in the crash of a Mexican-owned airplane on approach in fog to Tijuana airport, the district court found that the "pilots intentionally entered United States air space with the approval of Tijuana air control to make an instrument landing . . . the flight over California was neither accidental nor fortuitous." Olsen by Sheldon v. Government of Mexico, 729 F.2d 641, 649 (9th Cir. 1984), *cert. denied sub nom.*, 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984).

Olsen holds that negligent piloting in the United States, which causes wrongful death here, is sufficient for FSIA jurisdiction. Olsen at 646.

Scope of employment under the FSIA is determined by state law. Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1025 (9th Cir. 1987). Under California respondeat superior doctrine, whether an employee has committed a tort in the scope of employment is a question of whether: (1) the act was either required or incident to his duties, or (2) the employee's misconduct could reasonably be foreseen by the employer. Id. "Foreseeability" in this context "merely means that in the context of the particular enterprise an employee's conduct is not so usual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business." Id.;Mary M. v. City of Los Angeles, 56 Cal.3d 202, 209, 285 Cal.Rptr. 99, 814 P.2d 1341 (1991).

Exportadora contends that the pilot was not authorized to enter United States air space, and asserts that Exportadora requested that the pilot go to Mexicali if he encountered poor weather in Tijuana. (Petition at 18)

Exportadora misstates the facts. In fact, the pilot was told he could go to an alternate as an option. (A 237; A 30 F 47) Exportadora scheduled the flight to arrive at Tijuana at about 8:00 a.m. (A 212 ¶ 30) *In attempting to land in United States air space at 7:56 a.m. (A 41 F 81), the pilot was following Exportadora's instructions and flight schedule.*

The pilot's act was certainly within the scope of his employment and foreseeable. It would not be unfair to include the loss resulting from the pilot's tort among the other costs of the employer's business. The Ninth Circuit affirmed that the insurance to distribute the risk is properly a cost of Exportadora's business. Sugimoto at 1312. (A 116) This conclusion was amply supported by the evidence that the flight was an Exportadora business flight. The issues affirmed were specified in the pretrial order (CT 209, 1-7-93, p. 27:3-13) and were litigated. Exportadora's statement to the contrary is false.

The district court's implied finding that the pilot acted within the scope of his employment was not error.

An agent has implied or incidental authority to proceed in a reasonable manner, even under unexpected conditions. 2 Witkin, Summary of California Law, 9th Ed. (1987), § 79, p. 82. Fog was not unexpected. The pilot believed an ILS landing could be attempted. (A 36 F 69-72)

The pilot had implied authority to use the Tijuana ILS in the United States. *The pilot filed an instrument flight rules flight plan before departure.* (A 32 F 53) The ILS extends for miles into the United States. (A 155-156; A 269; A 272-273) *The flight was virtually certain to use United States air space, as would any ILS instrument flight.*

An agent has authority to do "everything necessary or proper and usual" to effect the purpose of his agency. Cal.Civ.Code § 2319. The scope of the agent's authority is a

question of fact. Mary M. v. City of Los Angeles, 56 Cal.3d 202, 213, 285 Cal.Rptr. 99, 814 P.2d 1341 (1991). The scope of authority may be established by circumstantial evidence.Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 376 (9th Cir. 1954); Ripani v. Liberty Loan Corp., 95 Cal.App.3d 603, 611, 157 Cal.Rptr. 272 (1979); Vargas v. Ruggiero, 197 Cal.App.2d 709, 716, 17 Cal.Rptr. 768 (1961).

Exportadora never argued, neither at trial nor in the Court of Appeals, that the pilot was unauthorized to enter United States air space. The Court should not consider an argument on a factual issue that is presented for the first time in the Supreme Court. Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992).

Exportadora's argument that jurisdiction should not be defined by the elements of the state law claim (Petition at 21) is an argument that the opinion in Saudi Arabia was incorrect. Saudi Arabia defines jurisdiction by the elements of the theory of the case, a clear, uniform rule that the Court should not reconsider.

4. The Decisions of the Ninth Circuit are Correct and Consistent with Saudi Arabia.

Exportadora misstates the holding of the Ninth Circuit in Schoenberg, where the Ninth Circuit did consider whether the case was based on commercial activity having substantial contact with the United States. Schoenberg at 780. (A 95) While the "based upon" requirement was not defined by the elements of the claim, the Ninth Circuit affirmed that Exportadora's transportation of decedents in the United States was a commercial activity having substantial contact with the United States. The case was based on arranging round-trip transportation from and to the United States through the defendant's office in the United States, and on transporting the decedents in the United States. Schoenberg at 780-782. (A 97-99).

Whether Exportadora retained a duty to transport

decedents safely was reserved in the opinion written by Judge Rymer. Schoenberg at 782 n.3. (A 99 n. 3)

The district court at trial resolved the question of retained duty. The Ninth Circuit in Sugimoto affirmed that Exportadora retained a duty to transport the passengers safely. Again, Sugimoto held the case is based upon the transportation of the decedents by Exportadora in the United States. The opinions are consistent, and each is correctly decided. Nothing is left out, nor is the basis for jurisdiction new, as Exportadora inaccurately asserts.

The petition misstates the holding in Sugimoto. Sugimoto affirmed that Exportadora controlled the transportation offered to business visitors, arranged their transportation, determined how they would come and how they would go. (A 8) The corporate transportation link enterprise remained Exportadora's, the party primarily to be benefited, who selected the contractor, was free to insist on one who is financially responsible, to demand indemnity from him, and the insurance to distribute the risk is properly a cost of Exportadora's business. (A 116) These issues were litigated at trial. Exportadora's statement to the contrary is false. (Petition at 25; A 60 - 62)

Exportadora's control was in part exercised, and the decedents' round trip travel arrangements were made, through the defendant's office in the United States. Schoenberg at 781. (A 15 F 6; A 22 F 20-23; A 47-48; A 51, F 103; A 52, F 104; A 68, F 130) Schoenberg affirmed that round-trip travel arrangements were made at the outset. (A 129, 145 n.2; A 98; A 51 F 103)

Sugimoto correctly applied Saudi Arabia in affirming that "Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space". Sugimoto at 1311. (A 7) The pilot was acting on behalf of Exportadora, in a commercial activity for which Exportadora received consideration and commercial benefit. (A 31 F 49; A 22 F 24) The trial judge's findings were not error. Anderson v. City of

Bessemer City, 470 U.S. 564, 575, 84 L.Ed.2d 518, 528, 105 S.Ct. 1504 (1985); Rule 52(a), Fed.R.Civ.P.

5. Implied Contract.

The circuits agree that arranging transportation in the United States is sufficient to confer jurisdiction where the case is based on breach of the contract of carriage arranged here. Barkanic v. CAAC, 822 F.2d 11, 13-14 (2nd Cir. 1987) (travel in China arranged in the United States); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 271-273 (3rd Cir. 1980) (tickets purchased from travel agent in New Jersey for travel in Mexico).

The element of contractual duty was undertaken by Exportadora in the United States when it began to transport the passengers. Brown v. Feather River Lumber Co., 203 Cal. 493, 497-498 (1928); Wheeler v. San Francisco and Alameda R.R., 31 Cal. 46, 49, 53-54 (1866). (A 51-54)

The United States was a designated place of performance for Exportadora's obligation to transport the passengers back to San Diego. There is jurisdiction where the designated place of performance for a corporation's commercial contract is the United States and the breach of that agreement has direct effects in the United States. Republic of Argentina v. Weltover, 504 U.S. - - , 119 L.Ed.2d 394, 408, 112 S.Ct. 2160 (1992).

6. Ostensible Agency.

The passengers' reliance on Exportadora, an element of ostensible agency, began in the United States, where Exportadora accepted the passengers as the carrier for a round trip, and ended in the United States in the accident.

Additional manifestations by Exportadora to the passengers that the pilot was its agent occurred in Mexico, where the pilot was introduced by Exportadora, without disclosure of his status, as the pilot for the flight the next

day. (A 30 F 47; A 240; A 65 F 126) The facts are nearly identical to the facts in Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980), where the singer Jim Croce lost his life in an undisclosed, last minute, substituted charter flight.

The trial judge's factual finding of ostensible agency, which rested in part on Exportadora's conduct in the United States (A 65 F 126), was not clear error. Anderson v. City of Bessemer City, 470 U.S. 564, 575, 84 L.Ed.2d 518, 529-30, 105 S.Ct. 1504 (1985).

7. The Substitute was Acting as a Contract Carrier, Not Acting as a Common Carrier.

Aviones was acting as a contract carrier under a contract with Exportadora, held to a standard of ordinary care, not acting as a common carrier. (A 48 F 98) Exportadora so argued to the district court to argue for a standard of ordinary care (A 287-288), and is bound by judicial estoppel that Aviones was acting as a private carrier at the time of the accident. Yanez v. United States, 989 F.2d 323 (9th Cir. 1993); Hopkins v. Yellow Cab, 114 Cal.App.2d 394, 397-398 (1952).

A common carrier contracted to perform a special service for a company acts as a private carrier. Hopkins at 397-398. If Aviones were acting as a common carrier it would have been held to a standard of the utmost care. Andrews v. United Airlines, Inc., 24 F.3d 39, 40 (9th Cir. 1994). The fact that Aviones normally operated as a common carrier is irrelevant. (A 48) The case concerns corporate transportation for business visitors, not common carrier transportation for passengers with tickets.

C. There is No Conflict with Weltover.

Exportadora contends that its activity was not commercial because it received no payment for the flight, and the test for commercial activity should be whether the

activity is customarily carried on for a profit, citing Aschenbrenner v. Conseil Regional de Haute-Normandie, 851 F.Supp. 580, 585 (S.D.N.Y. 1994). Exportadora misstates the facts. Exportadora received valuable consideration, and commercial benefit, for the transportation of each passenger. (A 22 F 24; A 61 F 120) Exportadora's statement that benefit was not litigated is false.

The Supreme Court in Weltover rejected the "for profit" test of commercial activity: "the question is not whether the foreign government is acting with a profit motive . . . the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade, and traffic or commerce'" Weltover, 119 L.Ed.2d 394 at 405.

Exportadora is thus arguing that the Court's opinion in Weltover was incorrect, that the profit motive test should have been adopted.

Exportadora's transportation of the passengers was commercial activity, as affirmed in Schoenberg, found by the district court at trial, and affirmed in Sugimoto. In Schoenberg, the Ninth Circuit held that the nature of transporting people from one place to another is a commercial activity, and that acquiescing in a request from a stockholder is an activity that a private entity can perform. (A 95-97) At trial the district court found Exportadora's transportation to be commercial. (A 22 F 24) The decisions of the lower courts in this case are consistent with the definition of commercial activity in Weltover.

III. THERE IS NO CONFLICT WITH OTHER CIRCUITS.

A. There is No Issue of Separate Juridical Existence.

Exportadora contends that the holding in this case

conflicts with Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3rd Cir. 1993), *cert. denied sub nom.*, El Jay Travel, Inc. v. Algemeen Burgerlijk Pensionenfonds, 128 L.Ed.2d 663 (1994). In that case a holding company was the parent of two subsidiaries that entered into a joint venture to own an office building in the United States.

In Federal Insurance, the district court attributed the activities of the subsidiaries to the holding company because of its status as a parent corporation. The Third Circuit reversed, holding that "the acts of separate corporations should not be attributed to related foreign entities unless [not] doing so would 'work fraud or injustice'". Federal Insurance at 1286.

The Third Circuit also recognized that separate corporate status should be disregarded when control is so extensive as to create the relationship of principal and agent. Id. at 1287.

The present case is readily distinguishable from Federal Insurance. Exportadora did not form a subsidiary to operate its corporate transportation link. The routine company airplane flights and company van transportation were done directly by Exportadora. Exportadora itself arranged and agreed to transport the passengers round trip. Exportadora itself undertook the non-delegable duty, began the round trip transportation in the United States, and chartered a substitute air taxi for its company airplane.

A person may do by agent any act which he might do himself. 2 Witkin, Summary of California Law, 9th Ed. (1987), § 75, p. 78-79; Cal.Civ.Code § 2330. To immunize foreign states for the acts of their agents in the United States, as Exportadora asks the Court to do, would be to create a special immunity from liability for foreign states only, at the expense of the public in this country, who could not recover damages for their losses.

Every authorized agent is a separate entity of one kind or another. The issue in this case is not the same as the issue of separate corporate existence. The issue here is

the principal's commercial activity performed by an agent in the United States.

None of the grounds for liability in this case, non-delegable duty, contractual duty, or ostensible agency, were present in Federal Insurance, or in any of the other cases cited by Exportadora as to separate corporate existence.

Indeed, the opinion in this case is consistent with Federal Insurance's recognition that commercial activities are attributed where the relationship of principal and agent exists, as under a non-delegable tort duty, non-delegable contractual duty, or ostensible agency. Federal Insurance at 1287. Finally, there would be great injustice if the activities of the charter pilot were not attributed to Exportadora, whose commercial activity killed the decedents.

B. The Circuits Agree that the Principal's Commercial Activity, Carried On Through an Agent in the United States, is the Principal's Commercial Activity for Jurisdiction.

The circuits agree that under the FSIA, the principal's commercial activity, carried out through an agent in the United States, is the commercial activity of the principal. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304, 313 (2nd Cir. 1981) (New York bank appointed as agent for letters of credit by foreign state); Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2nd Cir. 1994) (lead banks appointed agents for Kuwait in New York); Sugarman v. AeroMexico, Inc., 626 F.2d 270, 273 (3rd Cir. 1980) (travel agent sold ticket for foreign state in New Jersey); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988) (Delaware corporation acted as agent for foreign state in negotiating in United States);Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-1107 (D.C.Cir.1982)(acts of an authorized agent may be attributed to the principal); Transamerican

Steamship Corp. v. Somali Democratic Republic, 767 F.2d 999, 1003 (D.C.Cir. 1985) (embassy of foreign state acted as collection agent for instrumentality of foreign state); Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1287 (3rd Cir. 1993), *cert. denied sub nom.*, El Jay Travel, Inc. v. Algemeen Burgerlijk Pensionenfonds, 128 L.Ed.2d 663 (1994) (activities of an agent may be attributed to the principal).

There could hardly be any other rule if business is to be transacted through agents.

III. OTHER EXCEPTIONS, ALLEGED AND ARGUED, ESTABLISH JURISDICTION.

Three other exceptions establishing jurisdiction were alleged and argued to the Ninth Circuit. Exportadora's statement that no other exceptions were considered is false.

First, under the third clause of the commercial activities exception, 28 U.S.C. § 1605(a)(2)[3], the direct effects clause, the claims arise from the commercial activity of Exportadora elsewhere that has caused a direct effect in the United States.

"Where the incident is a fatal plane crash, the direct effects are loss of life and the destruction of the aircraft." Compania Mexicana De Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354, 1360 (9th Cir. 1988). Exportadora's delegation of duty to a substitute, introducing the pilot without disclosure of his status, and sending the airplane to the San Diego-Tijuana area at a time when fog was forecast were commercial acts, elements of torts with direct effects in the United States. Vermeulen v. Renault U.S.A., Inc., 985 F.2d 1534 at 1544 n.13, *cert. denied*, 124 L.Ed.2d 246 (1993); Weltover, 119 L.Ed.2d 394 at 407.

Plaintiffs alleged the direct effects clause in the complaint (A 197 ¶ 8), set forth the clause in the pretrial order (A 208) and argued it to the Ninth Circuit in both appeals. Exportadora's statements to the contrary are false.

Second, the implied waiver exception, 28 U.S.C. § 1605(a)(1), is applicable. The defendant waived sovereign immunity in opening statement, stipulated to jurisdiction at trial to save time, and never argued sovereign immunity in closing. (A 219-220, 222-223) [14] The defendant waived sovereign immunity. Exportadora's statements that it did not waive sovereign immunity are false.

Even agreeing to a choice of law clause, to be governed by the law of the United States or of the States, is a waiver of sovereign immunity. Eckert Int'l, Inc. v. Government of Fiji, 32 F.2d 77, 80 (4th Cir. 1994). Agreeing to a trial to be governed by United States law and California law, as Exportadora did, is certainly a waiver. The question is whether the foreign state voluntarily involved the United States courts in the claims. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 721-723 (9th Cir. 1992), *cert. denied*, - - U.S. - - , 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

Respondents made a motion to amend the jurisdictional allegation to allege implied waiver in the Ninth Circuit under 28 U.S.C. § 1653.

Third, under the second clause of the commercial activities exception, 28 U.S.C. § 1605(a)(2)[2], the pilot's negligence is an act in the United States in connection with the commercial activity of the foreign state elsewhere.

The Court may affirm the existence of subject matter jurisdiction on any ground appearing in the record, regardless of whether the parties or the lower courts relied upon that ground. United States v. Washington, 969 F.2d 752, 755 (9th Cir. 1992). Subject matter jurisdiction is a question of law which does not depend upon the statutes identified in the pleadings. Gerritsen v. de la Madrid

[14] Exportadora's statement that the trial court refused to reconsider the issue of jurisdiction is false. Exportadora never asked the trial court to reconsider jurisdiction.

Hurtado, 819 F.2d 1511, 1515 (9th Cir. 1987).

IV. THE TWO-COURT RULE.

Two courts - the district court and the Ninth Circuit - have each twice considered the issue of jurisdiction and have ruled each time against Exportadora. The Supreme Court should not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271, 275, 93 L.Ed. 672, 677, (1949); Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987). The "two court rule" applies.

V. CONCLUSION.

If the petition is granted, the question should be whether there is subject matter jurisdiction under the Foreign Sovereign Immunities Act, fairly including all exceptions.

Respondents respectfully submit that the Ninth Circuit has correctly applied the law. This Court's recent opinions are dispositive, and should not be reconsidered. There is no conflict between the circuits, and no issue of importance for the Court's review.

Certiorari should be denied.

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Belmont, California

Respectfully submitted,

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